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U.S. Department of Homeland Security

Citizenship and Immigration Services

OFFICE OF ADMINISTRATIVE APPEALS
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

File: WAC 02 104 52254 Office: CALIFORNIA SERVICE CENTER Date: MAR 29 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

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Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is an ornamental iron manufacturer and installer. It seeks to employ the beneficiary as an ornamental ironworker. As required by statute, the petition was accompanied by certification from the Department of Labor. The director concluded that the petitioner had not established that it had the continuing financial ability to pay the beneficiary's proffered salary as of the visa priority date.

On appeal, counsel submits additional evidence and argues that the director did not properly evaluate the petitioner's financial information.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In this case, eligibility for the visa classification rests upon whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 13, 1998. The beneficiary's salary as stated on the labor certification is $15.03 per hour or $31,262.40 annually. The petitioner is organized as a corporation.

At the outset, it is noted that the application for labor certification was filed by "A&D Iron Works, Inc., " a different entity than the petitioner. The regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. Labor

certifications are valid indefinitely unless invalidated by CIS, a consular officer, or a court for fraud or willful misrepresentation of a material fact involving the labor certification application. The Department of Labor and the former Immigration and Naturalization Service (INS) agreed that INS would make a determination regarding whether the employer listed in the labor certification and the employer filing the employment-based immigration petition are the same entity or a successor-in-interest to the original entity.[1] If the employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. *See, e.g., Matter of United Investment Group,* Int. Dec. 2990 (Comm. 1985).

In this case, the petitioner initially failed to submit sufficient evidence establishing that it is the successor-in-interest to A&D Iron Works, Inc. It also failed to submit sufficient proof of its continuing ability to pay the beneficiary's proposed salary of $31,262.40. On March 28, 2002, the director requested additional evidence from the petitioner relevant to these issues. The director advised the petitioner that it should submit financial information consisting of either copies of annual reports, complete federal tax returns, or complete audited financial statements to show its ability to pay the proffered wage. The director also requested that the petitioner submit copies of its state quarterly wage reports for the last four quarters that were filed. Finally, the director instructed the petitioner to send copies of documentation that shows that the petitioner became a successor-in-interest to A&D Iron Works, Inc. by acquiring all its rights, duties, assets, and obligations.

In response, the petitioner submitted persuasive documentation in support of its claim to be a successor-in-interest to A&D Iron Works, Inc. Specifically offered was a copy of the minutes of a special meeting of the petitioner on August 15, 1999. This document states that the petitioner resolved to purchase the outstanding shares of A&D Iron Works, Inc. for $20,000 and to "assume all the right, title, interest in and to the assets of A&D Iron Works, Inc.," as well as its duties and obligations. The document was signed by the petitioner's secretary and president. The petitioner also submitted a declaration from "Avraham Afrait." Mr. Afrait is the former President of A&D Iron Works, Inc. His declaration corroborates the purchase transaction as described in the petitioner's corporate minutes.

The petitioner additionally submitted copies of its last four quarterly state wage reports beginning with the quarter ending March 31, 2001 through the quarter ending March 31, 2002. These reports indicate that the petitioner employed from five to seven employees during this period and paid between $20,000 and $30,000 in wages each quarter. These records do not indicate that the petitioner employed the beneficiary during that time.

The petitioner also submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for the years 1998 through 2001. Its 1998 corporate tax return indicates that the

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[1] *See* DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

petitioner declared $12,271 in ordinary income. In 1999, the petitioner had $7,078 in ordinary income. In 2000, the petitioner's tax return shows that it claimed -$22,256 in ordinary income. In 2001, the petitioner's ordinary income was $43,112. This last figure represents the only year in which the petitioner could pay the beneficiary's proposed salary of $31,262.40 out of its ordinary income of $43,112. It is noted that in 1998, 1999, and 2000, the petitioner's current liabilities exceeded its current assets as shown on Schedule L of the respective returns. Therefore, the petitioner's evidence failed to demonstrate that it had sufficient net income or sufficient net current assets to cover the beneficiary's proposed salary.

It is also noted that because the employment opportunity is the same as that offered by A&D Iron Works, Inc., the petitioner must show that the wage offer of $31,262.40 could have been met when the application for labor certification was accepted for processing by the Department of Labor on January 13, 1998. This means that the petitioner must show that the predecessor firm had the ability to pay the certified wage at the time of filing. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Here, the record indicates that the transfer of ownership did not occur until August 15, 1999. The record does not contain any financial information relating to A&D Iron Works, Inc. Thus the petitioner failed to establish that the wage offer could have been met as of the time of filing and continuing until the transfer of ownership. As noted above, the petitioner's tax returns for 1999 and 2000 continue to show a lack of ability to pay the proffered salary.

On appeal, counsel resubmits the petitioner's corporate tax returns for 1998-2001. Counsel contends that the petitioner's net income is not an appropriate measure of its ability to pay the proffered salary. Counsel also urges that the depreciation expense, officers' compensation, and a 1999 suspense account deduction should also be added back to the petitioner's net income and submits an accountant's letter dated September 19, 2002 in support of this position. The accountant's letter also presents a comparison between profit figures resulting from calculations using both the cash basis and accrual basis of accounting. It is noted that none of the profit figures given for 1999 or 2000, individually, are sufficient to cover the beneficiary's salary of $31,262.40.

In determining the petitioner's ability to pay the proffered wage, CIS reviews the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

Counsel's assertion that the petitioner's retained earnings of $15,903, as shown on Schedule L of its 1999 tax return, should be included in the calculation, is also unpersuasive. As noted above,

CIS will examine net income figures including, in some cases, a petitioner's net current assets as monies that would be readily available to meet the proffered wage. Net current assets are the difference between current assets and current liabilities. It identifies the level of liquidity that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the balance sheet. As discussed above, the petitioner's balance sheets shown on Schedule L of its 1999 and 2000 tax returns both showed that current liabilities exceeded current assets. Current assets include consideration of such items as cash and inventory. Current liabilities include such items as accounts payable and liabilities payable in less than one year. *See Sitar v. Ashcroft,* (2003 WL 22203713 (D. Mass)).

In view of the foregoing, we cannot conclude that the petitioner has persuasively demonstrated the ability of the predecessor company to pay the certified wage as of the visa priority date, or its own continuing ability to pay the beneficiary's proposed salary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.